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Financing Affordable Housing in Georgia: The Possibility of a Dedicated Revenue Service

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FINANCING AFFORDABLE HOUSING IN GEORGIA: THE POSSIBILITY OF A DEDICATED REVENUE SOURCE

Frank S. Alexander[†]

INTRODUCTION

Access to safe, decent, and affordable housing has been a national dream for over fifty years.[1] During this period the federal government, as opposed to state or local governments, occupied the primary role in support of affordable housing. Beginning in the 1930s with direct and indirect support for long-term home mortgages, mortgage insurance programs, and the initial public-housing facilities, the federal government and its allied agencies became intimately and intricately involved in virtually every conceivable approach to stimulating real estate finance and providing affordable housing.

In contrast to the extensive involvement of the federal government in affordable housing, until very recently state and local governments have not played a significant role in providing financing for the development of housing for low and moderate income families, or housing for persons with special needs.[2] For

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1. The United States Congress declared in 1949 that:

> [T]he general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage . . . and the realization as soon as feasible of the goal of a decent home and [a] suitable living environment for every American family. . . .

Housing Act of 1949, Pub. L. No. 81-171, ch. 338, 63 Stat. 413 (codified as amended at 42 U.S.C. § 1441 (1988)). Congress reaffirmed this national goal in 1968. Pub. L. No. 90-448, 82 Stat. 476 (1968) (codified at 12 U.S.C. § 1701t (1988)).

2. "Special needs housing" loosely refers to housing opportunities for persons with special needs, such as housing for persons with AIDS, and housing for the mentally ill. From the perspective of the development and financing of affordable housing, special needs housing assumes (1) that the target population will have little or no

most of this century state and local governments have affected the quality and supply of affordable housing through the enactment of zoning regulations, land use restrictions, and building codes. Over the last two decades, however, affordable housing has become a higher priority for state and local governments as they have assumed administrative responsibility for disbursement of federal block grant funds and created public authorities authorized to issue tax exempt mortgage revenue bonds.

As we close the twentieth century, a profound shift is occurring in governmental responsibility for affordable housing, a shift away from the dominance of the federal role and the relative passivity of the state and local government functions. Congress and the Department of Housing and Urban Development (HUD) are moving rapidly to shift decisionmaking responsibilities for housing to state and local governments and to reduce the amount of federal financial support for affordable housing. The state and local sectors thus face increased responsibility for meeting the needs of their citizenry for safe, decent, and affordable housing, and finding a method of financing such efforts.

The shift in responsibility for affordable housing and special needs housing from the federal to state and local governments is occurring at a time when the number of persons lacking housing is greater than at any time over the last sixty years. The number of persons in the state of Georgia who are homeless[3] on any given night is estimated to be as high as 50,000 to 75,000.[4] The causes of this tragic rise in homeless persons are manifold, and heavily debated, but certainly include such elements as the simple cost of housing relative to the distribution of income among those living in poverty, the deinstitutionalization of

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disposable income to provide a rental income stream, and (2) that an intense social services component must be financially structured into the housing development pro forma in order to meet the needs of the residents. Both assumptions require a financing package for special needs housing that is substantially greater than conventional affordable housing.

3. "A homeless person is one who (1) lacks a fixed, regular, and adequate nighttime residence, or (2) lives in a shelter, an institution other than a prison, or a place not designed for or ordinarily used as a sleeping accommodation for human beings." Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 482, 485 (1987) (codified at 42 U.S.C. § 11302(a)-(c) (1988)).

4. GEORGIA DEPARTMENT OF COMMUNITY AFFAIRS AND GEORGIA HOUSING & FINANCE AUTHORITY, FY 1995 CONSOLIDATED PLAN OF THE STATE OF GEORGIA 38 [hereinafter CONSOLIDATED PLAN].

mentally ill persons beginning in the late 1960s and early 1970s, and, ironically, the success of "urban renewal" programs and building code enforcement programs that eliminated substantial numbers of substandard housing units concentrated in inner-city slums. In 1995, more than one out of every four households in Georgia occupied substandard housing, and 10% of all households in Georgia paid greater than 50% of their income for housing.[5] Among the elderly population in Georgia, 46% are either classified as very low income,[6] and over 100,000 low-income elderly persons reside in substandard housing.[7]

In anticipation of the transformation in the spheres of responsibility for housing, and in recognition of the growing numbers of persons who are homeless, state and local governments across the country have taken two small but critical steps towards ensuring a source of revenues to support affordable housing programs. The first step has been the creation of housing trust funds with designated responsibility for distribution of federal and state monies for affordable housing programs and services to individuals and families who are homeless. Georgia created its State Housing Trust Fund for the Homeless in 1988,[8] and over eighty state and local housing trust funds now exist across the country.[9] The second step has been the establishment

5. *Id.* at 15. A housing unit is considered substandard if (1) it lacks a complete kitchen, (2) it lacks complete plumbing, (3) it is overcrowded (more than 1.01 persons per room), or (4) the household pays more than 30% of its income for housing. *Id.* at 12. When a household spends more than 50% of its income on housing, it is considered "severely cost-burdened." *Id.* at 15.

6. *Id.* at 6-7. "Low Income" families are families whose income does not exceed 80% of the area median income, while "very low income" families are those whose income does not exceed 50% of the area median income. United States Housing Act of 1937, § 3(b), as amended, 42 U.S.C. § 1437a(b)(2) (1988). The calculation of the family income, and the determination of area median incomes, are made by the federal government in conjunction with the eligibility for public housing, 24 C.F.R. § 913.102, and the Section 8 program, 24 C.F.R. § 813.102. The availability for tax credits for low-income housing is determined with reference to families at 50% of the area median income and 60% of the area median income. I.R.C. §§ 42(g)(1), 142(d) (1989). The calculations of income are tied to the determinations for public housing and Section 8 assistance. *Id.* §§ 42(g)(4), 142(d)(2)(B).

7. CONSOLIDATED PLAN, *supra* note 4, at 6-7.

8. 1988 Ga. Laws 717 (codified at O.C.G.A. §§ 8-3-300 to -310 (1989)). A special statewide study committee recommended creation of Georgia's Trust Fund. *See* HOMELESS IN GEORGIA: REPORT OF THE SPECIAL STUDY COMMITTEE ON THE PROBLEMS OF THE HOMELESS IN GEORGIA 48 (Dec. 1987).

9. *State and Local Governments: A New Frontier for Housing Dollars*, COMMUNITY CHANGE (Center for Community Change, 1000 Wisconsin Avenue, NW, Washington, D.C. 20007), Summer 1994, at 1.

of a source of revenues, which is dedicated to funding programs in affordable housing.[10] The most common source of dedicated revenues has been a portion of the real estate transfer tax, or document recording tax, but other sources include interest on real estate brokers' escrow accounts, proceeds from bond refinancings, unclaimed property funds, and repayments from rental rehabilitation loan programs.[11]

In order to meet the increased responsibility of assuring residents the opportunity for safe, decent, and affordable housing in coming years, state and local governments must be prepared to identify revenue sources that can be used, with maximum flexibility, to support public and private partnerships in the development of housing. This Article examines in detail the possibilities for a dedicated revenue source for housing in the state of Georgia. Part I explores the unique constitutional history of Georgia with respect to the dedication of revenues and offers an explanation of why Georgia dedicates a far smaller percentage of revenues than most states in the country.[12] It also identifies the optimum structure for a state constitutional amendment, which would permit the dedication of selected revenues to housing. Part II evaluates the current status of the real estate transfer tax and mortgage recording tax under Georgia law and the statutory feasibility of using an increase in such taxes as a source of dedicated revenues. Part III addresses the competing policies at stake in the dedication of public revenues to particular

10. "Dedicated revenue source" is generically used to refer to taxes, charges, or other fees that, by law, are directly and automatically allocated to a specific agency or to a specific program. Often referred to as the "earmarking" of taxes, the two most common examples in the United States historically have been the dedication of revenues to transportation purposes (financing highways and roads through a motor fuel tax) and to public education (elementary, secondary, and higher education). *See generally* ARTURO PEREZ & RONALD SNELL, EARMARKING STATE TAXES (3d ed. 1995); Ronald K. Snell, *Earmarking State Tax Revenues*, 16 INTERGOVERNMENTAL PERSP. 12 (Fall 1990); MARTHA A. FABRICIUS & RONALD K. SNELL, EARMARKING STATE TAXES (2d ed. 1990).

11. CENTER FOR COMMUNITY CHANGE, CURRENT TOPICS FROM THE HOUSING TRUST FUND PROJECT 1 (Mar. 1994) [hereinafter CURRENT TOPICS]. The Housing Trust Fund Project is a project of the Center for Community Change. The Director of the Housing Trust Fund Project is Ms. Mary Brooks, HCS Box 8132, Frazier Park, CA 93225 (805-245-0318).

12. As of 1993, Georgia dedicated approximately 6% of its gross state revenues, as compared to a national average of 24%. Only Rhode Island (5%), Hawaii (5%), and Kentucky (4%) dedicated a smaller percentage of state revenues. PEREZ & SNELL, *supra* note 10, at 22.

public purposes. This Article focuses on the feasibility of creating a dedicated source of revenues at the state, rather than the local government, level. While pursuit of revenue sources for affordable housing by individual counties or municipalities is certainly an option, the sheer magnitude of the housing needs of our community at large necessitates a statewide approach.

I. DEDICATING REVENUES UNDER GEORGIA LAW

In recent years housing has clearly and unequivocally emerged as a priority for the state of Georgia, and is well within the permissible purposes for which the state may impose taxes or fees.[13] The General Assembly declared, in 1991, "the state's policy to provide decent, safe and affordable housing to all segments of the population of this state."[14] Over twenty years ago the state created the Georgia Residential Finance Authority[15] for the purpose of issuing tax-exempt bonds to finance single-family and multifamily mortgage loans at below

13. The Constitution provides that "the power of taxation over the whole state may be exercised for any purpose authorized by law." GA. CONST. of 1983, art. VII, § 3, ¶ 1(a). This broad delegation of the power of taxation to the General Assembly was one of the significant features of the new Constitution of 1983. Prior to 1983, the Georgia Constitution set forth a specific and limiting list of permissible purposes for taxation. The Constitution of 1976 set forth thirteen enumerated purposes for which the power of taxation could be exercised. GA. CONST. of 1976, art. VII, § 2, ¶ 1. This enumeration of purposes created a persistent difficulty for judicial determinations of whether the power of taxation was otherwise inherent in the General Assembly, or whether the enumeration of purposes implied a constitutional limitation on permissible governmental functions. *Compare* City Council v. Mangelly, 254 S.E.2d 315, 319, 243 Ga. 358, 361, (1979) ("The Georgia Constitution is a limitation upon the power of the General Assembly to tax . . . and the Constitution requires that the General Assembly not tax except where the express constitutional authorization has been granted.") (citations omitted) *with* Board of Commiss'rs v. Cooper, 264 S.E.2d 193, 196, 245 Ga. 251, 253 (1980) ("[T]he power to tax is inherent in the General Assembly, subject only to limitations in the Constitution."). Notwithstanding this debate over the permissible purposes for taxation, it appears that support for safe, decent, and affordable housing for low and moderate income families was within the police power of the state prior to the 1983 Constitution. Rich v. State, 227 S.E.2d 761, 764, 237 Ga. 291, 292 (1976).

14. O.C.G.A. § 8-3-171 (Supp. 1996); *see also* O.C.G.A. § 36-82-181 (1993) ("The economic development and the availability of safe, sanitary, and affordable housing in the State of Georgia are of vital importance to the state and its citizens.").

15. 1974 Ga. Laws 975; O.C.G.A. §§ 50-26-1 to -21 (Supp. 1996). In 1991 the name was changed to the Georgia Housing and Finance Authority in recognition of broader responsibilities for economic development as well as housing. 1991 Ga. Laws 1653. In 1996, GHFA was restructured to become a part of the state Department of Community Affairs. 1996 Ga. Laws 872.

market rates.[16] The Authority aslo is the designated agency for administration of the federal Low-Income Housing Tax Credit program, the Section 8 Rental Assistance Program, and the HOME program.[17] The State Housing Trust Fund for the Homeless was created as a sister agency to the Georgia Housing and Finance Authority (GHFA), with an independent statutory and constitutional framework, and is governed by a separate board of Commissioners.[18]

Neither GHFA nor the Housing Trust Fund is funded by a dedicated revenue source. GHFA operations are funded primarily through the costs of issuance of tax-exempt bonds and fees for administration of federal programs,[19] while the Housing Trust Fund has been funded through appropriations from the General Assembly at the level of $3.375 million each year.[20] If a dedicated revenue source is to be a viable option for financing the responsibilities of state and local governments for housing in coming years, it must be enacted with a full understanding of the unique historical perspectives of the "earmarking" of revenues under Georgia law.

A. The Historical Dilemma Posed by Dedicating Revenues

As the national economy teetered towards collapse during the Great Depression, the state of Georgia faced its own fiscal crisis. The state budget had begun incurring regular operating deficits, covered in part by receiving in advance long term leasehold

16. The basic constitutionality of the Authority's programs was sustained in Rich v. State, 227 S.E.2d 761, 237 Ga. 291 (1976).

17. GEORGIA HOUSING & FINANCE AUTHORITY, OPENING DOORS FOR GEORGIANS, GEORGIA HOUSING & FINANCE AUTHORITY ANNUAL REPORT (1995) [hereinafter GHFA REPORT].

18. O.C.G.A. §§ 8-3-301 to -311 (Supp. 1996). Two of the nine commissioners of the Housing Trust Fund serve ex officio, the Commissioner of the Department of Community Affairs and the chair of the Board of Directors of the Department of Community Affairs. *Id.* § 8-3-306(a). By statute, the staff of the Department of Community Affairs serves as the staff for the Trust Fund. *Id.* § 8-3-306(c). The constitutional foundation for the Housing Trust Fund is the express exclusion of the Trust Fund from the constitutional requirements for the annual lapse, or return, of any unspent funds to the state General Fund, and exemption from the state constitutional prohibition on aid to churches. GA. CONST. of 1983, art. III, § 9, ¶ 4(d).

19. GHFA REPORT, *supra* note 17; *see also* 75 Op. Att'y Gen. 40 (1975) (opining that the General Assembly could not appropriate funds directly to GHFA, but that such funds could be provided to GHFA through contracts with other state agencies).

20. STATE HOUSING TRUST FUND FOR THE HOMELESS, 1995 ANNUAL SUMMARY AND AUDIT REPORT (1996).

payments at a discount. The essence of the crisis, commentators concluded, was the General Assembly's lack of budgetary control over the majority of state revenues and expenditures.[21] In 1929, over 62% of the aggregate state revenue was dedicated to two specific purposes, transportation and education, leaving only 38% "to pay for the complete civil establishment, the state institutions, charitable, educational, and otherwise, and to take care of such other special appropriations as were made."[22] "The difficulties which have been encountered in keeping appropriations and revenues in balance have been produced, in part, by the established practice of allocating certain revenues to specific objects, thus placing the burden of all other appropriations upon the undesignated revenues which support the general fund."[23]

For the next fifteen years the General Assembly and special study commissions struggled with legislative and constitutional reforms to end, or at least reduce significantly, the mandatory allocation of state revenues to particular agencies.[24] With the adoption of a new state constitution in 1945, the state of Georgia substantially reversed the practice of automatically allocating major portions of the state budget to particular agencies. This new constitution provided that "[t]he appropriation for each department, officer, bureau, board, commission, agency, or institution for which appropriation is made, shall be for a specific sum of money, and no appropriation shall allocate to any object, the proceeds of any particular tax or fund or a part or percentage thereof."[25]

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21. *See* MALCOLM H. BRYAN, THE FISCAL POSITION OF GEORGIA (1930); HARLEY L. LUTZ, THE GEORGIA SYSTEM OF REVENUE: ITS PROBLEMS AND THEIR REMEDIES (1930).

22. BRYAN, *supra* note 21, at 87.

23. LUTZ, *supra* note 21, at 16. "It must be emphasized that the budget plan will hardly operate successfully in Georgia unless the present system of allocating the yield of certain taxes to designated objects is abandoned and all revenues and expenditures pass through the budget." *Id.* at 23.

24. INTERIM REPORT OF THE GEORGIA TAX REVISION STUDY COMMISSION 100 (Feb. 1968) ("A major factor preventing comprehensive budgetary analysis in the period 1931 to 1943 was the system of revenue allocations. Under this system more than one-half of the income of the State was allowed to be expended each year with neither a legislative nor a top level executive examination of the feasibility or need.").

25. GA. CONST. of 1945, art. VII, § 9, ¶ 4. This section was carried forward in the 1976 Constitution as art. III, § 9, ¶ 6, and in the current 1983 Constitution as GA. CONST. of 1983, art. III, § 9, ¶ 6(a). The 1983 Constitution added a prefatory clause at the beginning of this section, "Except as hereinafter provided. . . ." *Id.* A similar anti-earmarking clause in the constitution is applicable to county and municipal

Shortly after the adoption of the Constitution of 1945, the Georgia Supreme Court was given the opportunity to construe and apply this new requirement. In holding unconstitutional an allocation of rental receipts to a special fund, the Court observed that:

> Since the adoption of the Constitution of 1877 the legislature has frequently by appropriation allocated to different departments of the State the funds derived from various sources. As a matter of State history, such practices in the field of financing the State government have proven unsatisfactory and too frequently an injustice to other departments.[26]

B. The Constitutional Limitations

Over the course of its history, the state of Georgia has had ten different constitutions.[27] The most obvious bar to the creation of a new dedicated revenue source is this "Anti-earmarking Clause" first adopted in the Constitution of 1945. Two other constitutional provisions, however, also bear directly on the ability of the General Assembly to designate revenues from a particular source to a particular agency or program. The "General Fund Clause" of the constitution requires that all revenues be paid directly into the General Fund of the state treasury,[28] and the "Appropriation Clause" requires that no funds be "drawn from the treasury except by appropriation made by law."[29] As judicial decisions over the past few decades indicate, the viability of any attempt to allocate specific revenues to specific programs depends upon the intricate interplay of these three separate constitutional provisions.

The primary impetus behind these provisions was the loss of authority and responsibility of the General Assembly for making the decisions affecting the fiscal affairs of the state. There is, however, a subtle yet crucial distinction to be drawn in the

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taxes: "nor shall any taxes collected be allocated for any particular purpose, unless otherwise provided by this Constitution or by law." GA. CONST. of 1983, art. IX, § 4, ¶ 3.

26. State Ports Auth. v. Arnall, 41 S.E.2d 246, 256, 201 Ga. 713, 728-29 (1947).

27. MELVIN B. HILL, JR., THE GEORGIA STATE CONSTITUTION: A REFERENCE GUIDE 3-15 (1994).

28. GA. CONST. of 1983, art. VII, § 3, ¶ 2(a).

29. GA. CONST. of 1983, art. III, § 9, ¶ 1.

manner in which revenues may be dedicated, or earmarked, for particular programs. One form of earmarking is when the state legislature chooses to earmark certain funds but retains at all times full authority and responsibility for the terms, conditions, restrictions, amounts, and duration of the earmarking. A second is when the dedication of revenues is constitutionally mandated, depriving the General Assembly of all authority and responsibility. The second form of dedication is most problematic to sound public policies.

1. The Anti-earmarking Clause

The adoption of the Anti-earmarking Clause in the 1945 Constitution has had a dramatic effect on the budgetary policies of Georgia, dropping the percentage of the state budget, which is earmarked from among the highest in the country in 1929 at 62%,[30] to among the lowest in the country in 1993 at 6%.[31] The primary exception throughout this period of time to this prohibition against earmarking revenues has been the dedication of motor fuel taxes to the Department of Transportation for "maintaining an adequate system of public roads and bridges in this state. . . ."[32] One of the unusual characteristics of the motor fuel tax exception is that it does not merely permit the General Assembly to dedicate those taxes to public roads and bridges; rather, it constitutionally mandates such an appropriation by the General Assembly.[33]

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30. BRYAN, *supra* note 21, at 87.

31. PEREZ & SNELL, *supra* note 10, at 22. National studies on the earmarking of revenues normally exclude from such calculations the revenues derived from lotteries on the basis that lottery proceeds are neither a tax nor a fee, but instead a voluntary payment. *See id.* at 15; FABRICIUS & SNELL, *supra* note 10, at 2. Proceeds from the Georgia lottery are thus not included in these percentages. The Georgia lottery was authorized in 1992 by constitutional amendment. GA. CONST. of 1983, art. I, § 2, ¶ 8(c). This constitutional amendment includes specific exemptions from the Anti-earmarking and General Fund Clauses. *Id.*

32. GA. CONST. of 1983, art. III, § 9, ¶ 6(b). A proposed constitutional amendment that would have broadened the scope of permissible purposes for use of motor fuel tax revenues and created a Transportation Trust Fund was defeated on November 3, 1992. 1992 Ga. Laws 3339, § 2.

33. GA. CONST. of 1983, art. III, § 9, ¶ 6(b); *see also* Gregory v. Hamilton, 113 S.E.2d 395, 397, 215 Ga. 735, 737 (1960). The mandatory appropriation of these sums, without the possibility of budgetary reduction, does have the sole caveat that in the event of an invasion of the state or a major catastrophe the Governor may utilize the funds for defense or relief purposes. GA. CONST. of 1983, art. III, § 9, ¶ 6(b).

The clarity of, and mandatory nature of, the motor fuel tax exception from the Anti-earmarking Clause stands in sharp contrast to more recent constitutional amendments that have sought to create additional exceptions to this bar. Two of these amendments contain clear and express exceptions to the Anti-earmarking Clause, one for revenues payable to a Subsequent Injury Trust Fund[34] and a second for revenues payable to an Indigent Care Trust Fund.[35] Six other subparagraphs following the Anti-earmarking Clause of the Constitution are not as clearly drafted. Three of these provisions are not, in fact, exceptions to the Anti-earmarking Clause;[36] rather, these provisions stand as exceptions only to the constitutional requirement (found in the same sentence as the Anti-earmarking Clause) that all appropriations by the General Assembly be for a specific sum of money.[37] The remaining three subparagraphs, pertaining to the creation of a State Children's Trust Fund,[38] a Seed-Capital Fund,[39] and an Emerging Crops Fund,[40] address neither the

34. GA. CONST. of 1983, art. III, § 9, ¶ 6(c). This constitutional amendment was originally proposed in 1976 and ratified November 2, 1976. 1976 Ga. Laws 1762. The Subsequent Injury Trust Fund is designed to "encourage the employment of persons with disabilities by protecting employers from excess liability for compensation when an injury to a disabled worker merges with a preexisting permanent impairment to cause a greater disability than would have resulted from the subsequent injury alone." O.C.G.A. § 34-9-350 (Supp. 1996). An employer faced with greater liability than would have ordinarily arisen because of the merger of a preexisting condition with the compensable injury may seek reimbursement from the Trust Fund. Subsequent Injury Trust Fund v. Hanson Indus., 440 S.E.2d 89, 211 Ga. App. 700 (1994).

35. GA. CONST. of 1983, art. III, § 9, ¶ 6(i). This amendment was proposed in 1988, and approved November 8, 1988. 1988 Ga. Laws 2126, § 1. It was subsequently amended in 1992 to clarify that the dedication of revenues was possible. 1992 Ga. Laws 3333, § 1. This was approved on November 3, 1992. The purpose of the Indigent Care Trust Fund is to expand Medicaid eligibility and services and to support programs serving the medically indigent. O.C.G.A. § 31-8-154 (Supp. 1995).

36. One subparagraph permits criminal penalties to be allocated directly for the purpose of law enforcement training. GA. CONST. of 1983, art. III, § 9, ¶ 6(d); *see* O.C.G.A. § 15-21-70 (1994). A similar subparagraph authorizes criminal penalties or fees to be allocated directly for jails and correctional facilities. GA. CONST. of 1983, art. III, § 9, ¶ 6(h); *see* O.C.G.A. § 15-21-90 (1994). The General Assembly, by three-fifths vote, is also allowed to designate that taxes on alcoholic beverages be used "for prevention, education and treatment relating to alcohol and drug abuse." GA. CONST. of 1983, art. III, § 9, ¶ 6(e).

37. GA. CONST. of 1983, art. III, § 9, ¶ 6(a). ("[T]he appropriation for each department, officer, bureau, board, commission, agency or institution for which appropriation is made shall be for a specific sum of money.").

38. *Id.* ¶ 6(f). This constitutional amendment was proposed in 1986 and approved on November 4, 1986. 1986 Ga. Laws 1631.

39. GA. CONST. of 1983, art. III. § 9, ¶ 6(g). This constitutional amendment was

Anti-earmarking Clause, nor the clause requiring appropriations for specific sums. Instead, these provisions appear to be simply misplaced as they amend an entirely separate section of the constitution. Each of these three amendments excepts the applicable funds from a separate provision of the constitution providing for the annual lapse, or return, of obligated appropriations to the General Fund of the state.[41]

Judicial interpretations of the Anti-earmarking Clause have reflected the strength of the public policy, which prompted its adoption in 1945.[42] For example, shortly after the adoption of the constitutional amendment pertaining to the State Children's Trust Fund, the General Assembly enacted legislation providing for a substantial increase in marriage license fees, with the revenues dedicated to the State Children's Trust Fund.[43] Because the constitutional amendment did not contain an express exception from the Anti-earmarking Clause, the Supreme Court had little difficulty holding unconstitutional the statutory dedication of such fees.[44]

2. *General Fund Clause*

Consistent with the desire to overcome the lack of functional control over state expenditures that existed prior to 1945, the new constitution incorporated a requirement that all revenue "collected from taxes, fees, and assessments for State purposes, as authorized by revenue measures enacted by the General Assembly, shall be paid into the General Fund of the State Treasury. . . ."[45] Partially because these provisions were critical parts of the significant changes incorporated in the 1945

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proposed in 1988, and approved on November 8, 1988. 1988 Ga. Laws 2106.

40. GA. CONST. of 1983, art. III. § 9, ¶ 6(j). This constitutional amendment was proposed in 1990 and approved November 6, 1990. 1990 Ga. Laws 2441.

41. *See* GA. CONST. of 1983, art. III, § 9, ¶ 4(c).

42. Gregory v. Hamilton, 113 S.E.2d 395, 215 Ga. 735, 737 (1960); State Ports Auth. v. Arnall, 41 S.E.2d 246, 201 Ga. 713, 728-29 (1947).

43. 1987 Ga. Laws 1133.

44. Collins v. Woodham, 362 S.E.2d 61, 257 Ga. 643 (1987).

45. GA. CONST. of 1945, art. VII, § 2, ¶ 3. This provision was carried forward in the Constitution of 1976 as art. VII, § 2, ¶ 3, and in the current constitution as GA. CONST. of 1983, art. VII, § 3, ¶ 2(a). The prefatory clause, "Except as otherwise provided in this Constitution," was added in the adoption of the 1983 Constitution. A proposed constitutional amendment creating an exception for fees for processing agricultural products was submitted for public approval in November 1996. 1996 Ga. Laws 167.

Constitution, this General Fund Clause and the Anti-earmarking Clause have been construed together as the two primary bars to the statutory creation of dedicated revenue sources in Georgia. The Georgia Supreme Court has held that even in the context of the constitutionally authorized dedication of motor fuel tax revenues to transportation purposes,

> [T]he purpose of . . . [the General Fund Clause] . . . was to end the practice of allocating or earmarking particular taxes for the use by any specific department, and to require the General Assembly to appropriate from the General Fund specific amounts for each fiscal year for the support of each department or agency.[46]

This General Fund Clause has posed equal difficulties in the determination of whether fees, refunds, or miscellaneous receipts by state agencies and departments could be used by the agencies or must all be paid into the General Fund. The Attorney General has stated that licensing fees of state examining boards,[47] delinquent scholarship payments,[48] and certain penalties[49] must be paid into the General Fund, though five categories of receipts have been identified as not subject to the General Fund requirement.[50]

3. Appropriation Clause

The third clause found in the Georgia Constitution, which poses an obstacle to the dedication of revenues, is the requirement that "[n]o money shall be drawn from the treasury except by appropriation made by law."[51] Present in every Georgia constitution since 1789,[52] this provision is an obstacle

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46. Gregory v. Hamilton, 113 S.E.2d 395, 397, 215 Ga. 735, 737 (1960). Critical to this conclusion was that the 1952 constitutional amendment that mandated the dedication of motor fuel taxes revenues did not specify the payment of those revenues into any separate fund. *Id.* at 737-38.

47. 1976 Op. Att'y Gen. 93; 1948-49 Op. Att'y Gen. 631.

48. 1971 Op. Att'y Gen. 126.

49. 1954 Op. Att'y Gen. 14.

50. 1977 Op. Att'y Gen. 77. These five categories are (1) gifts and grants, (2) proceeds of the sale of property, (3) funds received from other agencies of state government, (4) income received by the judiciary, and (5) miscellaneous funds generated without a statutory basis. *Id.*

51. GA. CONST. of 1983, art. III, § 9, ¶ 1.

52. HILL, *supra* note 27, at 4. It was carried forward in the 1945 Constitution as GA. CONST. of 1945, art. III, § 7, ¶ 11, and in the 1976 Constitution as GA. CONST.

because of the specific and extensive constitutional requirements pertaining to the annual appropriations act. The Governor is required to submit an annual appropriations bill for "the funds necessary to operate all the various departments and agencies and to meet the current expenses of the state for the next fiscal year,"[53] and the General Assembly annually adopts an appropriation act for these funds,[54] as well as a supplemental appropriations bill for any surplus funds.[55] These appropriation requirements also provide that all funds not spent or contractually obligated by the end of the fiscal year lapse are retained in the General Fund.[56]

The Anti-earmarking Clause, the General Fund Clause, and the Appropriations Clause have, since 1945, stood as a strong barrier to the mandatory allocation, or dedication, of revenues from particular sources to specific agencies or programs. They were adopted in large measure to unravel the dilemma in which the state found itself in the 1930s when the overwhelming majority of the aggregate state revenues was outside of the annual budget authority of the General Assembly. As a consequence, the state of Georgia presently dedicates, or earmarks, a smaller percentage of its aggregate revenues than virtually any state in the country.[57]

The earmarking of motor fuel tax revenues to the Department of Transportation is the only constitutionally mandated dedication of revenues in Georgia that is beyond the authority of the General Assembly.[58] In two other instances, involving the Subsequent Injury Trust Fund[59] and the Indigent Care Trust Fund,[60] the constitution has been clearly amended to permit the possibility of earmarking revenues.[61] In both of these instances,

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of 1976, art. III, § 10, ¶ 1.

53. GA. CONST. of 1983, art. III, § 9, ¶ 2(a).

54. *Id.* ¶¶ 2(b), 4.

55. *Id.* ¶ 5.

56. *Id.* ¶ 4(c). A constitutional amendment, ratified on November 8, 1988, expressly exempts the State Housing Trust Fund for the Homeless from this lapse of funds. *Id.* ¶ 4(d). For unexplainable reasons, amendments or exceptions to this lapse provision are also found in GA. CONST. of 1983, art. III, § 9, ¶ 6 (State Children's Trust Fund, Seed Capital Fund, Indigent Care Trust Fund, Emerging Crops Fund).

57. PEREZ & SNELL, *supra* note 10, at 22.

58. GA. CONST. of 1983, art. III, § 9, ¶ 6(b).

59. *Id.* ¶ 6(c).

60. *Id.* ¶ 6(i).

61. A third constitutional amendment, which authorized the lottery, earmarks the

in contrast, the constitutional exemptions are permissive in nature, leaving the General Assembly full authority and responsibility to determine by general law the scope and extent of any earmarking of revenues.

C. Authorizing A Dedicated Revenue Source for Affordable Housing

The State Housing Trust Fund for the Homeless exists by virtue of general law,[62] and has been accorded constitutional recognition. The constitution was amended to exempt the Trust Fund from the lapse of funds requirement of the appropriation clauses and to permit the Trust Fund to provide support to religious institutions serving persons who are homeless.[63] The Trust Fund may be designated as the agency to receive federal funds[64] for "residential housing projects," which include programs designed to enhance residential housing opportunities for low-income persons, and to "financ[e] in whole or in part the acquisition, rehabilitation, improvement, or construction of residential rental housing and interest rate or down payment assistance programs designed to enhance home ownership opportunities."[65]

In order to create the possibility of a dedicated revenue source for affordable housing in Georgia, the clearest approach would take advantage of the existing constitutional and statutory foundations of the Trust Fund. The appropriate constitutional amendment would simply add, to the existing clause referring to the Trust Fund, an exemption from the Anti-earmarking Clause, the General Fund Clause, and the Appropriation Clause.[66] In

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proceeds by express exemptions from the Anti-earmarking Clause and the General Fund Clause. GA. CONST. of 1983, art. I, § 2, ¶ 8(c). The requirements of the Appropriations Clause are also addressed by provisions in this amendment that require the net proceeds to be appropriated, in the discretion of the General Assembly, to educational programs and educational purposes. *Id.*

62. O.C.G.A. §§ 8-3-300 to -311 (Supp. 1996).

63. GA. CONST. of 1983, art. III, § 9, ¶ 4(d); 1988 Ga. Laws 2098. This amendment was approved November 8, 1988.

64. O.C.G.A. § 8-3-309 (Supp. 1996).

65. *Id.* § 8-3-301(6).

66. *See, e.g.*, GA. CONST. of 1983, art. III, § 9, ¶ 4(d). The existing constitutional clause provides as follows:

> Funds appropriated to or received by the State Housing Trust Fund for the Homeless shall not be subject to the provisions of Article III, Section IX, Paragraph IV(c), relative to the lapsing of funds, and may be

this form, the amendment would not, in and of itself, mandate the dedication or earmarking of funds to the Trust Fund.[67] Any enabling legislation that would accomplish the dedication of these funds would still remain within the full authority and responsibility of the General Assembly.

II. TWO POSSIBLE DEDICATED REVENUE SOURCES FOR AFFORDABLE HOUSING

Thirty-six states, and the District of Columbia, presently levy taxes on the transfer of real estate, or on the filing of deeds, mortgages, and security instruments.[68] In twelve of these states a portion of the transfer tax, or documentary tax, is dedicated to a state housing trust fund to provide funding for affordable housing activities.[69]

A. *Real Estate Transfer Tax*

At the present time, the state of Georgia imposes a tax on the transfer of interests in real property at the rate of $1.00 per $1000 of net value transferred.[70] Transfers by certain parties,

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expended for programs of purely public charity for the homeless, including programs involving the participation of churches and religious institutions, notwithstanding the provisions of Article I, Section II, Paragraph VII.

Id.

The necessary amendment would modify this clause to read as follows:

Funds appropriated to or received by the State Housing Trust Fund for the Homeless shall not be subject to the provisions of Article III, Section IX, Paragraph IV(c), relative to the lapsing of funds, *or the provisions of Article III, Section IX, Paragraph VI(a), Article VII, Section III, Paragraph II(a), and Article III, Section IX, Paragraph I,* and may be expended for programs of purely public charity for the homeless, including programs involving the participation of churches and religious institutions, notwithstanding the provisions of Article I, Section II, Paragraph VII.

67. A proposed amendment must be approved, in Resolution form, by two-thirds of the House and Senate, and "shall be submitted to the electors of the entire state at the next general election which is held in the even-numbered years." GA. CONST. of 1983, art. X, § 1, ¶ 2. Unless specified otherwise, the amendment, if approved by a majority of those voting, becomes effective on the 1st day of January following its approval. *Id.* ¶ 6.

68. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM M-197 (Sept. 1995).

69. These states include Delaware, Florida, Hawaii, Illinois, Maine, Nebraska, Nevada, New Jersey, Pennsylvania, South Carolina, Tennessee and Vermont. CURRENT TOPICS, *supra* note 11, at 21-26, 28, 30.

70. O.C.G.A. §§ 48-6-1 to -3 (1991 & Supp. 1996). The tax is calculated at $1.00

involuntary transfers,[71] and certain forms of transfers[72] are expressly exempt from payment of the tax. Revenues generated by this tax are distributed among the state, the municipality, and the county in which the property is located in proportion to the state or local government's percentage share of the aggregate millage rate for the property taxes.[73] The aggregate revenues generated by this tax in recent years were as follows: 1993, $18.8 million; 1994, $22.6 million; and 1995, $23.7 million.[74]

As a revenue measure for the state of Georgia, this tax was enacted in 1967 and made applicable to all transfers as of January 1, 1968.[75] The tax itself, however, had existed as a source of federal, rather than state, revenue for well over one hundred years. Doubtless having origins in the documentary and stamp acts at the core of the American Revolution,[76] the federal government initially chose this method of taxation to finance war efforts. The stamp tax, in almost its identical form and with an identical rate of taxation, was first imposed by Congress as part of the Internal Revenue Act passed in 1862 to finance the War Between the States,[77] and was reinstated by the War Revenue

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for the first $1000, or fraction thereof, then $.10 for every additional $100, or fraction thereof. *Id.* § 48-6-1 (1991).

71. *Id.* § 48-6-2(a)(3) to (5) (Supp. 1996).

72. *Id.* § 48-6-2(a)(6) to (7.1), (9) to (10).

73. *Id.* § 48-6-8(c). Prior to 1996 the statute provided for distribution in accordance with the distribution formula for all intangible taxes. With the repeal in 1996 of the general intangible tax, the same distribution formula was preserved. *See* 1996 Ga. Laws 117, 130.

74. Telephone Interview with Colleen Ramirez, State Revenue Department (Mar. 1996) [hereinafter Ramirez Interview].

75. 1967 Ga. Laws 788.

76. The first federal stamp act was the Act of July 6, 1797, "[a]n Act laying Duties on stamped Vellum, Parchment and Paper," 1 Stat. 527, though this Act did not expressly impose a tax or duty on deeds or other instruments of conveyance. *Id.* The terms of this act were renewed in the Act of August 2, 1813, 3 Stat. 77, which "act shall continue in force until the termination of the war in which the United States are now engaged with the United Kingdom of Great Britain and Ireland." *Id.*

77. It should come as a surprise to many Georgians that the current provisions of the real estate transfer tax are derived almost verbatim from this tax first imposed to finance the costs of defeating the Confederacy. *See* O.C.G.A. § 48-6-1 (1991). The Act of July 1, 1862, provided that the tax applied to any "[d]eed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons by his, her or their direction, when the consideration or value exceeds one hundred dollars." Act of July 1, 1862, ch. 119, § 10, 12 Stat. 480, 481.

Act of 1898 to fund the costs of the Spanish-American War.[78] The tax was revived during the First World War,[79] and after a brief demise in the late 1920s[80] was once again levied to help fund the federal Depression-era legislation.[81] During the Second World War, the tax rate increased from $1.00 to $1.10 per $1000[82] and remained a source of federal revenue until its repeal in 1965.[83] The repeal of the federal tax was effective December 31, 1967, and the Georgia General Assembly carefully crafted its transfer tax to take the place of the federal stamp tax without interruption.[84]

Georgia was not alone in enacting this source of revenue when the federal government elected to abolish the federal tax. Within five years, at least thirty-eight states across the country were imposing real estate transfer taxes at substantially the same rate as had the federal government.[85]

Of the states that presently impose a real estate transfer tax, there is a wide range in the rate of taxation.[86] Georgia's rate of $1.00 per $1000 is equal to or lower than those of other Southern states,[87] including Alabama ($1.00),[88] Arkansas ($3.30),[89] Florida ($7.00),[90] Kentucky ($1.00),[91] North Carolina ($2.00),[92]

78. War Revenue Act of June 13, 1898, 30 Stat. 448, 460.

79. Revenue Act of 1914, ch. 331, 38 Stat. 745; Revenue Act of 1918, ch. 18, 40 Stat. 1137; Revenue Act of 1921, ch. 136, § 1101, 42 Stat. 301, 305.

80. This stamp tax on conveyances was repealed by § 1200 of the Revenue Act of 1926, 44 Stat. 9, 126.

81. Revenue Act of 1932, Pub. L. 72-154, 47 Stat. 169, § 725.

82. I.R.C. § 4361 (1954).

83. Excise Tax Reduction Act of 1965, Pub. L. No. 89-44, § 401, 79 Stat. 136.

84. 1967 Ga. Laws 788, § 12.

85. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, THE PROPERTY TAX IN A CHANGING ENVIRONMENT tbl. B-15, 291-92 (Mar. 1974).

86. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM (Sept. 1995); STATE TRANSFER AND REAL ESTATE TAXES tbl. 37 (Dec. 1994).

87. The rates set forth are exclusive of fees levied in connection with the recording of documents when the fees are not based on the value of the transaction but simply upon the number of documents, or the number of pages in the document. *See* 1967 Ga. Laws 788.

88. ALA. CODE § 40-22-1 (1993).

89. ARK. CODE ANN. § 26-60-105 (Supp. 1995).

90. FLA. STAT. ANN. § 201.02 (Supp. 1996).

91. KY. REV. STAT. ANN. § 142.050 (Supp. 1994).

92. N.C. GEN. STAT. § 105-228.30 (1995).

South Carolina ($2.60),[93] Tennessee ($3.70),[94] and Virginia ($2.50).[95]

In a number of these jurisdictions, portions of the real estate transfer tax proceeds are allocated to specific funds. These include the Arkansas Natural and Cultural Resources Council,[96] the Florida Land Acquisition Trust Fund and State Housing Trust Fund,[97] the North Carolina Parks and Recreation Trust and Natural Heritage Trust Fund,[98] the South Carolina Heritage Land Trust Fund and the Housing Trust Fund,[99] and the Tennessee Wetland Acquisition Fund and Local Parks Land Acquisition Fund.[100]

B. Recording Tax on Security Deeds

In addition to the real estate transfer tax, Georgia imposes a tax on the recording of security deeds.[101] The tax rate is $3.00 per $1000 of the face amount of indebtedness secured by the security deed.[102] The origins of this particular tax lie in the 1937 creation of a tax on intangible personal property, including promissory notes.[103] The purpose of the tax was, in part, to provide a source of revenue to local governments to help offset

93. S.C. CODE ANN. § 12-21-380 (Supp. 1995).
94. TENN. CODE ANN. § 67-4-409(a) (Supp. 1996).
95. VA. CODE ANN. §§ 58.1-801, -802 (Supp. 1996).
96. ARK. CODE ANN. §§ 15-12-101 to -103 (Michie 1994).
97. FLA. STAT. ANN. § 201.15(1)(a), (6) (Supp. 1996).
98. N.C. GEN. STAT. § 105-228.30(b) (1995).
99. S.C. CODE ANN. § 12-21-380 (Supp. 1995).
100. TENN. CODE ANN. § 67-4-409(g), (i) (Supp. 1996).
101. O.C.G.A. § 48-6-61 (1991). The tax is imposed on security instruments that secure long term notes, which are defined as notes having a term of three years or greater. *Id.* § 48-6-60(3).
102. *Id.* § 48-6-61. The maximum amount of the tax on any single security instrument is $25,000. *Id.* When there is only a substitution of, or modification of, the underlying note without cancellation of the security instrument, the amount of tax is based only on the new indebtedness reflected by the modification. *Id.* §§ 48-6-61, -62(b) (Supp. 1996).
103. *See* 1937-38 (Ex. Sess.) Ga. Laws 156. Pursuant to a constitutional amendment of 1937, the General Assembly at the special session of 1937-38 passed an Act that classified personal property for taxation. Prior to this Act, intangible personal property was taxed in the same manner, and at the same rate as other property. GA. CODE ANN. § 92-102 (Harrison 1933). Beginning in 1938, a tax was levied "at the rate of $1.50 on each $1,000 of the fair market value of . . . all notes or other obligations representing loans, secured by real estate, made by the state building and loan associations and federal savings and loan associations for the purpose of financing homes, as of the first day of January, up to the value of $5,000." 1937-38 Ga. Laws 156, § 3(aa).

the loss of revenues attributable to the creation of homestead exemptions from the property taxes.[104] In 1990, this tax was changed from a tax on the underlying promissory note to a tax on the recording of the security instrument.[105]

All revenues generated by this tax are distributed among the taxing jurisdictions of the secured property (including the state, counties, municipalities and school districts) based upon their respective shares of the existing millage rates applicable to that property.[106] The aggregate revenue generated by this tax was $85 million in 1993, $68.7 million in 1994, and $73 million in 1995.[107]

A tax on mortgages, or other security instruments, is not as widespread as the real estate transfer tax. Arkansas, Kentucky, North Carolina, and South Carolina do not impose a mortgage tax. Among other Southern states, Georgia's rate of $3.00 per $1000 is within the relatively wide range of tax rates that are imposed, for example, in Alabama ($1.50),[108] Florida ($3.50),[109] Tennessee ($1.15),[110] and Virginia ($1.50).[111]

III. THE POLICY RAMIFICATIONS OF DEDICATED REVENUES

On a national level, the percentage of state revenues dedicated to a particular program or agency declined sharply from 51.3% in 1954, 41.1% in 1963, 23% in 1979, to 21% in 1984.[112] Between 1984 and 1993 the national trend reversed, with the percentage of dedicated revenues rising to 24.4%.[113] For Georgia, the trend has shown a consistent decline, from 29% in 1954 to 6% in 1993.[114] The primary reason for the sharp decline on a national level in the percentage of dedicated revenues is the expansion of income and sales taxes as the primary sources of state government revenues, with these taxes expanding with a growing

104. 1937-38 (Ex. Sess.) Ga. Laws 156, § 11.
105. 1990 Ga. Laws 1843.
106. O.C.G.A. §§ 48-6-8, -72, -74 (Supp. 1996).
107. Ramirez Interview, *supra* note 74.
108. ALA. CODE § 40-22-2 (1993).
109. FLA. STAT. ANN. § 201.08 (Supp. 1996).
110. TENN. CODE ANN. § 67-4-409(b) (Supp. 1996).
111. VA. CODE ANN. § 58.1-803 (Michie 1991).
112. PEREZ & SNELL, *supra* note 10, at 3.
113. *Id.*
114. *Id.* at 22.

economy.[115] This is in contrast to the traditional forms of dedicated taxes, which usually grow far more slowly than the general economy. The most common form of dedicated tax, imposed in all fifty states, is the motor fuel tax, which alone accounted for 29% of the national total dedicated tax collections in 1993.[116]

There are three broad public policy objections to the establishment of dedicated revenues: (1) the loss of legislative budget responsibility and authority; (2) the loss of legislative fiscal oversight; and (3) the possibility that dedicated revenues do not necessarily produce new revenues for the specific agency.[117] The first objection is that the dedication of revenues removes legislative responsibility for the fiscal affairs of the state. The fiscal crisis confronting Georgia during the 1930s, when over 62% of its total revenues were outside of its general budgetary control, is a classic example of this dilemma. The problem is magnified tremendously when the revenues are constitutionally mandated, as in the case of Georgia's motor fuel taxes, for both the revenues and the agency receiving the revenues become largely autonomous of legislative control. "All funds earmarked in the Constitution are removed from the discretion of the General Assembly, and could paralyze the operation of state government if taken to the extreme."[118] When the revenues are dedicated by statute, rather than by the constitution, the legislature retains the ability and the authority to establish the terms and conditions for the dedication of revenues, including maximum dollar amounts and "sunset" provisions.

The second concern is that there is a lost of legislative oversight of the agency or department receiving the dedicated revenues, and the programs implemented by that agency or department. The perception is that because an agency or department receives dedicated revenues, it is free from the task of justifying, on an annual or biannual basis, the public policy

115. FABRICIUS & SNELL, *supra* note 10, at 1.

116. PEREZ & SNELL, *supra* note 10, at 5.

117. Professor Snell and his colleagues identify the following four basic criticisms of earmarking: (1) earmarking hampers legislatures' budgetary control by removing revenues and expenditures from the review that occurs in the appropriations process; (2) earmarking distorts the distribution of funds among programs; (3) earmarking reduces the flexibility of the revenue structure; and (4) earmarking infringes on the policymaking powers of the executive branch and the legislature. *Id.* at 12.

118. HILL, *supra* note 27, at 96.

need for a specific level of appropriations. Similarly, the legislature tends to refrain from weighing the relative importance of the mission of the agency receiving the dedicated revenues against the competing needs and priorities of the state.

The third point is that the creation of a source of dedicated revenues may not, in net effect, produce any significant additional revenues for the designated agency or program. Once the agency begins to receive the dedicated revenues, a legislature may reduce or eliminate the appropriations that had been provided to the agency prior to the establishment of the dedicated revenue source.[119] While there may be an increase in the aggregate revenues available to the state if the dedicated revenue source is a new source of revenue, no corresponding benefit results to the designated agency.

Each of these objections to the dedication of revenue has a foundation in our historical experience, both nationally and in Georgia. The objections, however, do not lead to the conclusion that a dedication of revenues is flatly unacceptable; rather, they stand as guideposts as to how a dedication of revenues must be constructed. So long as dedication of revenues is not constitutionally mandated, the legislature retains full discretion and authority to establish the basic parameters of the dedication, including full authority to reduce or terminate the dedication.

Three primary justifications exist for the establishment of a dedicated revenue source for certain programs: (1) dedication of revenues may be one of the few means of increasing state revenues; (2) the plausibility of the connection between the source of the revenues and ultimate use of the funds; and (3) stability in funding for the designated programs.[120] The first argument is essentially that general public resistance to tax increases can be overcome when there is a clear and direct tie between the proposed tax and the agency or program that is publicly identified. This justification is most forceful in the instance of new or increased taxes, rather than the dedication of existing revenue sources.

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119. *See* FABRICIUS & SNELL, *supra* note 10, at 17.

120. Professor Snell and his colleagues similarly identify the following four basic justifications for earmarking of revenues: (1) earmarking enforces a benefit principle between the services that are taxed and the use of the revenues; (2) earmarking ensures continuity of funding; (3) earmarking stabilizes state finances; (4) earmarking can induce the public to support new or increased taxes. PEREZ & SNELL, *supra* note 10, at 10.

The second justification is the perspective that there should be, when possible, a plausible connection between the activity subject to the tax and the agency receiving the benefit of the revenues. Motor fuel tax revenues being dedicated in part or in whole for highways, roads, and bridges is the classic example of this connection. Taxes on cigarettes and alcohol dedicated to healthcare and substance abuse programs is a more recent example. Providing revenues for affordable housing through a tax on real estate transfers or mortgages similarly exhibits a connection between the tax and the program being funded.

The third justification for dedication of revenues is that continuity and stability of funding is available to the designated agency or program. The accuracy of this justification depends on the relative stability of general legislative appropriations for the agency, as well as on the constancy and predictability of the revenues being generated by the designated revenue source.

As with the objections to dedicated revenues, each of these three justifications has a basis in our local and national experience. The increase in the percentage of dedicated revenues nationally from 21% in 1979 to 24.4% in 1993 suggests that state governments, for whatever reasons, are now more willing to permit dedicated revenue programs.

In considering the possible creation of a new dedicated revenue program, each of these public policy considerations must be evaluated in the context of the specific revenue source being proposed, the amount of revenues sought to be generated, and the entity and programs designated to receive the revenues. One possible source of dedicated revenues for affordable housing in Georgia is an increase in the real estate transfer tax. If the real estate transfer tax were increased from $1.00 per $1000 to $3.00 per $1000 and the revenues dedicated to the Housing Trust Fund, approximately $50 million in new revenues would be available.[121] The rate of real estate transfer taxation would still remain below the national average, and still be in line with the similar tax rates of other Southern states.[122] The effect of this new dedicated revenue program on the aggregate state budget

121. This amount is based upon the aggregate collections of approximately $24 million annually using a tax rate of $1.00 per $1000. The increase from $1.00 to $3.00 per $1000 would provide an aggregate of approximately $72 million. *See supra* text accompanying notes 70-74.

122. *See supra* notes 88-100 and accompanying text.

would be insignificant, increasing the percentage of dedicated revenues from 6% to 6.6%,[123] well below the 1993 national average of 24%. The impact on affordable housing programs across the state, however, would be dramatic, with the funding available to the Housing Trust Fund increasing from $3.375 million to $50 million annually. Even if the General Assembly chooses to reduce or eliminate the existing general appropriations to the Housing Trust Fund, there still would be a substantial increase in available funds. In the enabling legislation, the General Assembly could specifically restructure the imposition of the tax to minimize its impact on various segments of the population, for example, by creating a substantially higher minimum threshold before imposition of the tax, or by excluding transfers of residential property having less than a specified value. The General Assembly could further ensure its legislative authority and responsibility for the expenditures by establishing program criteria for the expenditure of funds, by establishing a fixed maximum dollar amount of the revenues which are dedicated, or by sharing with local governments part of the decisionmaking responsibility for allocation of the funds.

CONCLUSION

The twentieth century is largely the story of Georgia's misfortunes with, and reaction against, the dedication of revenues for particular programs. Since 1945, Georgia has had in place strong constitutional barriers to dedicated revenue programs, with the motor fuel tax as the sole substantial exception. In order to establish a new form of dedicated revenues for affordable housing programs, a constitutional amendment is necessary. The amendment, however, is not one that would return Georgia to its pre-1945 difficulties, for the amendment would be permissive, rather than mandatory, in nature.

The pending shift from the federal government to state and local governments of responsibilities for safe, decent, and affordable housing will place a far greater burden on the state and local governments to finance a broad range of affordable housing programs and services. Precisely because the state of

123. This increase is based upon Fiscal Year 1993 figures, which indicate total tax revenue of $8,346.4 million, with $500 million in existing dedicated revenues relating to highways and transportation. PEREZ & SNELL, *supra* note 10, at 59.

Georgia dedicates a far smaller percentage of its aggregate state revenues than most states in the country, it is in a position to create a new dedicated revenue source for affordable housing. Tying such new revenues to affordable housing programs is more likely to receive the public support necessary for the creation of new taxes. Finally, the General Assembly can establish and retain by statute full control over the revenues dedicated to affordable housing, thereby ensuring both public accountability and fiscal responsibility.